IN THE HIGH COURT OF BOMBAY AT GOA
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SECOND APPEAL NO. 46 OF 2002

Smt. Oval Babal Naik,
w/o Shri Babla Puno Naik,
major in age, housewife,
r/o Ambalai, Panchwadi,
Ponda, Goa, through her
daughter & Attorney
Holder, Miss Nirmal
Babal Naik. .... Appellant.

Versus

1. Smt. Rukmini Shablo
Naik, w/o Shablo Naik,
major of age, housewife,
r/o Ambalai, Panchawadi,
Ponda,

2. Shri Umesh Shablo Naik,
s/o Shri Shablo Naik,
major of age, service,
r/o Ambalai, Panchwadi,
Ponda, Goa, and

3. Shri Sanjay Shablo Naik,
s/o Shri Shablo Naik,
major of age, service,
r/o Ambalai, Panchwadi,
Ponda, Goa. ... Respondents.

Shri A. F. Diniz, advocate for the appellant.

Shri M. Amonkar advocate for the respondents.

CORAM: P. V. KAKADE, J.

DATE: 21st November, 2002.

ORAL JUDGMENT

Admit. With the consent of the parties heard forthwith.

The appellant/original plaintiff has preferred this appeal against the Judgment and Order passed by the Additional District Judge, Panaji, in Regular Civil Suit

No.37/2001 dismissing the appeal and thereby confirming the Order passed by the Civil Judge, Junior Division, Ponda, dismissing his suit which was filed as Regular Civil Suit No.170/90/B, seeking direction to the respondents to demolish the suit structure allegedly constructed on the suit pathway by way of mandatory injunction and other similar reliefs.

2. I have heard the learned counsel for both the sides at length and perused the record, including the Judgments of both the lower courts.

3. The facts involved in the dispute in a nut-shell are thus:-

It was the plaintiff's case that she has a residential dwelling house in the property known as "Vassu Bhat" situated at Ambalai, Panchwadi, Ponda, Goa, surveyed under new survey no.42/5 and this property is connected by a pathway of about 20 mts. in length and 1 mt. in width with the property belonging to Narayan Kamat and leads to the house of the appellant from the main road of Ponda-Panchwadi and has been used by the appellant and her family members for the last several years. The appellant had no pathway to go to her house and the respondents having their residential house in plot no.6, have illegally constructed a small bathroom on the said pathway

sometime in the second week of the month of May, 1986 and, therefore, a complaint was lodged with the Mamlatdar and health authorities, Ponda. Enquiries were held and the respondents were compelled to demolish the said bathroom in the last week of November, 1987. Thereafter, in the second week of July, 1988, the respondents again forcibly constructed a pucka room of laterite stones and mangalore tiles, thereby blocking the said pathway, for which a complaint was filed with the Sarpanch of the Village Panchayat at Panchwadi, but no action was taken in the matter. It is alleged that the respondent no.1 and the said Sarpanch were in collusion and filed a suit to protect the illegal construction, being Regular Civil Suit no.96/88, against the Village Panchayat and that the Sarpanch wilfully and with ulterior motive and in order to protect the illegal construction, remained absent, as a result of which the suit proceeded ex parte and decree was passed therein. Therefore, the Regular Civil Suit No.170/90/B came to be filed alleging that the suit structure is illegal and therefore, mandatory injunction should be granted to demolish the same, failing which, as the right of way of the appellant was being infringed, a direction to that effect was sought to the respondents by way of the suit and further a permanent injunction was also sought for.

The respondents/defendants resisted the suit,

stating that they were owners of the residential house in the property surveyed under no.42/5 and that the suit structure was a part and parcel of the ancestral dwelling house and the same was only repaired by the late husband of the respondent no.1 and that the appellant had no locus standi to challenge the decree in Regular Civil Suit No.96/88 and the appellant, therefore, had no right of way over the respondent's dwelling house and, therefore, the suit was sought to be dismissed with costs.

4. The learned Civil Judge adjudicated the dispute on merits and came to the conclusion that the appellant/plaintiff had failed to prove the existence of the suit pathway as a traditional and ancestral one. It was further held that the appellant was also unable to prove that the respondents had constructed a bathroom on the suit pathway, which was earlier demolished by the defendants themselves and, further, it was held that the earlier suit being Regular Civil Suit no.96/88, was not a nullity and, therefore, there was no question of setting aside the Order passed therein. Ultimately, the suit came to be dismissed. The plaintiff preferred and appeal in the District Court, Panaji and the learned Additional District Judge heard and decided the appeal on merits and concurred with the reasoning adopted and evidence recorded by the learned Civil Judge and, consequently, the appeal came to be dismissed with costs. Hence this Second

Appeal.

5. At the outset, it must be noted that on careful scrutiny of the entire issues involved, even at this stage, it is apparent therefrom that no substantial questions of law are required to be adjudicated. In fact, the so-called substantial questions of law sought to be raised in the memorandum of appeal show that those cannot be contemplated as substantial questions of law as envisaged by the provisions of Section 100 of the Code of Civil Procedure. A perusal thereof clearly shows that those are questions based on factual aspects and, therefore,cannot be held to be questions of law, leave aside substantial questions of law.

The learned counsel for the appellant vehemently urged that the Appellate Court had recorded a finding that there was no evidence on record to indicate the existence of the suit pathway which, according to the learned counsel, was no less than a perverse finding, because, in fact, there was sufficient evidence on record to hold that the existence of the suit pathway was established on record. A perusal of the judgment of the lower Appellate Court indicates that the learned Additional District Judge has come to certain conclusions on the basis of the available evidence on record. There was no sufficient evidence before him to establish the existence of the

traditional or ancestral pathway for the appellant to go from the main road to the house. No doubt that the appellant/plaintiff and his witnesses have testified in the course of their evidence that there exists such a way which leads to the main road from the house, however, there is no substantive documentary evidence on record to corroborate their version of the alleged existence of the pathway and in this situation, the learned Additional District Judge, has recorded a finding that there is no evidence to establish this aspect. In my considered view, the finding recorded by the lower Appellate Court is based on the available evidence on record, which was found to be inadequate to satisfy the judicial conscience to hold that such pathway existed at the material time and, therefore, it cannot be said that the findings recorded by the lower Appellate Court as well as by the learned Civil Judge in this regard, are perverse in any manner whatsoever.

6. The learned counsel for the appellant sought to put reliance on the Supreme Court ruling in the case of **Yadaraoa Dajiba Shirawane (Dead) by L.Rs.** vs. **Nanilal Harakchand Shah (Dead) & Ors.** { (2002) 6 SCC 404 }, wherein it was held that if the judgment of the lower court is based on misinterpretation of documentary evidence, or consideration of inadmissible evidence or ignoring material evidence, or on a finding of fact has ignored admission or concessions made by witnesses or

parties, then in that case the High Court was justified in interfering in Second Appeal. In my considered view, there cannot be two opinions about the ratio laid down by the Apex Court in this ruling. However, at the same time, I must observe that the said principle cannot be made applicable to the present case, mainly due to the reason that the available evidence was found to be inadequate and in that view the learned Additional District Judge concluded that there was no evidence to establish the relevant allegations of the appellant/plaintiff on record.

In this connection, it would be worthwhile to refer to the principles laid down by the Supreme Court regarding the scope of the provisions of Section 100 of the Code of Civil Procedure. In the case of **Kondiba Dagudu Kadam** vs. **Savitribai Sopan Gujar & Ors.** { (1999) 3 SCC 722}, it is observed in categorical terms that it was not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact, being the First Appellate Court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower Appellate Court is binding on the High Court in Second Appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the First Appellate Court, unless it is found that the conclusions drawn by the lower Appellate Court were

erroneous being contrary to the mandatory provision of law applicable, or its settled position on the basis of pronouncements made by the Apex Court, or was based on inadmissible evidence, or arrived at without evidence. In the present case before us what is found on record is a proper appreciation made by the lower courts on given facts and circumstances proved on record and, therefore, in my view, the learned Additional District Judge has properly re-appreciated the evidence before him while concurring with the reasoning adopted and the finding recorded by the Civil Court while adjudicating the suit.

7. Under the circumstances, I have no hesitation to hold that no substantial question of law is involved in this Appeal and the appreciation of evidence made by both the lower courts is legal and proper and all the factual aspects of the evidence are properly dealt with and, therefore, it would brook no interference by this Court under Section 100 of the Code of Civil Procedure.

In the result, the Second Appeal stands dismissed.

P. V. KAKADE, J.

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